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No. 95-56

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORT WAYNE NATIONAL CORPORATION,
Petitioner,

v.

THE INDIANA DEPARTMENT OF STATE REVENUE, and KENNETH L. MILLER, IN HIS CAPACITY AS COMMISSIONER OF THE INDIANA DEPARTMENT OF STATE REVENUE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Indiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions:

1. Whether a state violates the Contract Clause of the U.S. Constitution by first issuing bonds exempt from all state taxation and then subsequently subjecting those bonds to indirect taxation enacted as a "replacement" for indirect taxes from which the bonds had previously been exempted.

2. Whether violations of the Contract Clause of the United States Constitution are within the scope of the Civil Rights Act 42 U.S.C. § 1983, 1988.

PARTIES BELOW

The caption of the case contains the names of all parties to the proceeding. Petitioner, Fort Wayne National Corporation ("FWNC"), is an Indiana bank holding company doing business predominantly in Indiana. It has no corporate parent and no subsidiaries which are not wholly-owned. Respondent, the Indiana Department of Revenue ("Department"), is a state governmental agency charged with collection, and refund when appropriate, of the Financial Institutions Tax (FIT) Ind. Code § 6-5.5 *et seq.*, levied by the State of Indiana. Respondent Kenneth L. Miller is the Indiana Commissioner of Revenue. In the Indiana Supreme Court The Indiana League of Savings Institutions, Inc., appeared as Amicus Curiae.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fort Wayne National Corporation ("FWNC"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered by the Supreme Court of Indiana in this case on April 10, 1995.

REPORT OF OPINIONS BELOW

The opinion of the Indiana Tax Court granting Petitioner's relief as respects its refund claim is reported at *Fort Wayne Nat'l Corp. v. Indiana Dep't of State Revenue*, 621 N.E.2d 668 (1993) [App. B, pp. 14a-29a]. The decision of the Supreme Court of Indiana reversing the Indiana Tax Court is reported at *Indiana Dep't of State Revenue v. Fort Wayne Nat'l Corp.*, 649 N.E.2d 109 (1995) [App. A, pp. 1a-13a].

JURISDICTION

Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1257(a). The judgment of the Supreme Court of Indiana was entered on April 10, 1995. This petition is timely under 28 U.S.C. § 2101(c) having been filed within 90 days of the date of the decision of the Supreme Court of Indiana.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

Article I, § 10[1], United States Constitution:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ind. Code § 6-8-5-1(a), as in effect in 1989

> (a) All bonds issued after March 11, 1959, or notes, warrants, or other evidences of indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school

> corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.

Relevant history of the Indiana generic statutory tax exemption for municipal and other bonds subsequent to 1989, Ind. Code § 6-8-5-1, is set forth in App. C at pp. 30a-32a and described in fn 5 at pp. 18-19.

STATEMENT OF THE CASE

A. Facts and Procedural Setting

The case focuses on the ability of the state to renege on its bond contracts. The State of Indiana sought to do so by replacing tax exempt, indirect taxes in effect when the bonds were sold with taxable, indirect taxes. The bonds held by FWNC had been sold as exempt from prior indirect tax by virtue of the state's General Exemption Statute ("GES") Ind. Code § 6-8-5-1. The State then replaced the old indirect taxes with a new indirect tax, the FIT, and amended the GES specifically to except the new FIT from the scope of the exemption from taxation provided by the GES. This rendered taxable the income from the bonds which had previously been exempt from all taxation, both direct and indirect. This about-face reflected a second time over a fifty-plus year period in which municipal bonds had been made subject to tax in Indiana.

In 1932 Indiana enacted a wholly new indirect tax levied on gross income, Ind. Code § 6-2, *et seq.* Based upon the state's characterization of it as a privilege tax, Indiana's gross tax was sustained in *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), against the challenge that it could not constitutionally be applied to municipal bond income from previously outstanding bonds.[1] Thereafter, in Indiana municipal bond income continued to be subject to that state's Gross Income Tax until 1959 when the GES reversed this result by exempting municipal bonds from "all taxation".

Commencing in 1969 FWNC purchased the various municipal bonds which it held on the date in May 1989 the FIT was passed ("Bonds"). The Bonds were advertised and sold as exempt pursuant to the GES from all Indiana tax, including the Gross Income Tax. FWNC's Chief Executive Officer in charge of the bond purchases stated in an uncontested affidavit that he would not have paid the amounts he did for the Bonds if he had understood the GES could be amended so as to permit taxes which were replacements for outstanding taxes, such as the Gross Income Tax, to be applied to the income from the Bonds. The Bonds all had printed upon them a tax opinion referring to the GES (or in certain cases a special counterpart to the GES with substantially similar language) and indicating they were exempt from all Indiana taxation.

In 1989 the Indiana legislature passed the FIT with an effective date of January 1, 1990. FWNC paid under protest the portion of the FIT tax generated by the inclusion of income from its Bonds in the measure of its FIT liability and promptly sought refund of that amount on Contract Clause grounds, together with a claim under section 1988 of the Civil Rights Act, 42 U.S.C. § 1988,

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[1] In the more familiar part of the decision, this Court struck down the tax as applied to interstate commerce. *See, J.D. Adams Manufacturing Co. v. Storen, supra* at pp. 314.

for attorney's fees. The Indiana Tax Court sustained the claim for refund but on a statutory rather than on a constitutional ground. It held that, since the GES had exempted all indirect state taxes in effect when the Bonds were purchased, the Court would construe the FIT, which had replaced the prior indirect taxes, not to apply to previously outstanding bonds, including FWNC's Bonds, in order to avoid the retroactive effect which would result from doing so.

The Indiana Tax Court's conclusion that the GES had previously extended to indirect taxes was based on application of a variety of applicable canons of construction which the Court found both within the text of the GES and in its statutory history. The core of its opinion is set forth at p. 672 (App. B, p. 19a) as follows:

> Prior to the 1990 amendment, the GES excepted from its terms only the state inheritance tax. The exception of only the inheritance tax, like any statutory exception, must be strictly construed. *Natural Resources Comm'n v. Porter County Drainage Bd.* (1991), Ind., 576 N.E.2d 587, 589 (citing *Common Council of Peru v. Peru Daily Tribune* (1982), Ind. App., 440 N.E.2d 726. But it also implies the inclusion of all other taxes, including "measured by" taxes, which existed when the GES was promulgated. *See, e.g., Gross Income Tax Division v. Bartlett* (1950), 208 Ind. 505, 93 N.E.2d 174, *appeal dismissed* (1951), 340 U.S. 924, 71 S.Ct. 499, 95 L.Ed. 667. *See also Carylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 569 N.E. 765, 772-73, *aff'd* (1992), Ind., 587 N.E.2d 1311 (discussing the rule of construction of express inclusion and implied exclusion: the enumeration of certain items in a statute or regulation implies the exclusion of items not enumerated). The GES therefore included measured by taxes in its scope.
>
> More importantly, though, the subject matter of the FIT was included within the original GES. The

> FIT is a replacement tax for the gross income tax, adjusted gross income tax, bank tax, savings and loan association tax, and the production credit association tax for financial institutions within the meaning of IC 6-5.5-1-17. *See* IND. CODE 6-5.5-9-4. Like all taxes other than the inheritance tax, these taxes were within the scope of the GES. Taxpayers subject to the FIT are no longer subject to the predecessor taxes. *Id.* The FIT, then, is simply a continuation, albeit in a new form, of taxes long in existence.

Because the Indiana Tax Court's decision was based on statutory grounds, it denied FWNC's claim for attorney's fees under 42 U.S.C. § 1988 for having successfully defended its Contract Clause rights. The Tax Court's opinion also went on to raise various other objections to the application of the Civil Rights Acts, including the proposition that one of the early Civil Rights Act decisions, *Carter v. Greenhow*, 114 U.S. 317 (1885), had held that protection of the Contract Clause was not within the scope of the Civil Rights Act 42 U.S.C. § 1983.

The Supreme Court of Indiana granted review and (without directly addressing any of canons of construction which the Tax Court had found to apply or explaining how it was that the GES had exempted the Gross Income Tax, an indirect tax) reversed the Indiana Tax Court on the merits. Its decision was based upon its conclusion that the GES had *not* ever covered indirect taxes. As so construed, the GES could not contain a legislative promise of protection from indirect taxation, which would then have become a part of the various Bond contracts. The absence of a successful constitutional claim thus mooted any relief under the Civil Rights Acts, and the Supreme Court of Indiana did not expressly address the availability of such relief. This Petition for a Writ of Certiorari follows.

B. Raising the Federal Questions

FWNC raised the federal questions sought to be reviewed at every stage of the state court proceedings. FWNC argued both in the Indiana Tax Court and in the Supreme Court of Indiana that the application of the FIT to Bonds issued prior to the passage of the FIT violated the Contract Clause of the U.S. Constitution and such argument was repeated in its briefs. (App. D, pp. 33a-39a.) Similarly, FWNC has consistently argued that the Civil Rights Act, 42 U.S.C. § 1983, would apply to any Contract Clause claim. (App. D, pp. 40a.)

REASONS THE WRIT SHOULD BE GRANTED

The group of state and local bonds, taken as a class represent one of the largest categories, second only to U.S. bonds, of debt securities issued in the United States. Typically such bonds are issued bearing substantially below market interest rates premised upon and by reason of their tax-free status. It can fairly be said that their tax-free status is at the very essence of the bargain between the bond issuer and the bond buyer. This case raises the fundamental issue whether the states, which are increasingly in search of new revenue, may recant as to outstanding bonds on their promises of tax-free status, may withdraw the essence of the state's commitment all the while retaining the low interest rate which was the consideration for such promise, thereby materially reducing the value of outstanding bonds to their holders. A failure to protect the Indiana bondholders would send a signal to legislators in every state that their bondholders were fair game for virtually any revenue enhancement measure.

Such a result would also confirm the unfortunate impression, which has gained some currency recently in some state court decisions, that the Contract Clause is not a real restriction upon a state's freedom to alter its contracted-for obligations, whether to its bondholders or

to its employees. A review of those cases reveals widely-differing conceptions about the impact of the Contract Clause as a real restraint upon legislative rewriting of state obligations.

At the same time, this Court would have the opportunity to correct a century-old misreading of *Carter v. Greenhow, supra,* under which it is erroneously believed that that case stands for the proposition that the Civil Rights Acts do not extend to Contract Clause claims.

It is also important to understand what this case is not about. It is *not* about the ability of a state legislature to adopt and impose truly new taxes. If the FIT were a truly new tax and not merely a replacement for a tax previously exempted, *i.e.*, if the state were not undoing the benefit of the low rate bargain at the same time it kept on paying interest at the low rates, FWNC would not be complaining.[2] Also, it is not about the ability of a state legislature to repeal or withdraw normal, *non-contractual* tax exemptions or, with proper compensation, to do so even as respects contractual exemptions. It is plain and simple about the ability to promise FWNC that its Bonds would be free of existing tax, both direct *and* indirect, and then to subject them to such tax.

I. THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS IN THIS AREA

The era between World Wars I and II produced new taxes which, when newly-imposed upon previously tax-free municipal bonds, resulted in a series of cases in this

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[2] A purchaser of municipal bonds is interested principally in their yield relative to comparable taxable issues. The revocation of an existing exemption or the substitution of a taxable tax for an exempt tax upsets this relationship and thus takes away the very essence of what the buyer bargained for. In contrast, a situation in which all existing taxes and exemptions remain in place and a new additional tax is placed on all bonds at least maintains the municipal bondholder's relative after-tax yield vis-a-vis comparable taxable issues.

Court. In them, the Supreme Court generally sustained the legislature in applying new taxes to outstanding municipal bonds, except where the Court was clearly asked to approve subjecting outstanding bonds to a tax from which they had previously been exempted when sold. *Compare, McCallen v. Commonwealth of Massachusetts,* 279 U.S. 620 (1929), *reh'g denied,* 280 U.S. 513 (repeal of exemption invalid as applied to existing tax); *with Pacific v. Johnson,* 285 U.S. 480 (1932) (new tax not covered by old exemption). Among the taxes which were so upheld was Indiana's Gross Income Tax, enacted in 1932 and characterized by the state as a "privilege" tax, an indirect tax. *See, J.D. Adams Mfg. Co. v. Storem, supra* at 311. This Court concurred both with the state Supreme Court's interpretation of the nature of the tax and its conclusion that then-existing tax exemption for municipal bonds, first enacted in 1903 and later codified with provisions dealing solely with property tax and poll tax, could not reasonably be construed to apply to such a tax.

However, in 1959 after years of collecting Gross Income Tax on municipal bonds, Indiana passed a General Exemption Statute ("GES") which exempted municipal bonds from Indiana Gross Income Tax. Ind. Code § 6-8-5-1. Gross Income Regulations of the Indiana Department of Revenue issued promptly thereafter made it clear that the GES had exempted from the Gross Income Tax all of the bonds described in the GES. *See,* Section 51, p. 18, Indiana Gross Income Tax Regulation 1959, App. E, pp. 47a. Then, in 1989, Indiana replaced for banks and other financial institutions its Gross Income Tax and a subsequently-enacted alternative Bank Tax with a Financial Institutions Tax, which it imposed upon the municipal bond income of such institutions, chiefly banks. In so doing, it replaced existing indirect taxes, which were tax exempt as respects municipal bonds, with another tax, which was not. This brings the present

fact situation within the ambit of and the ruling in direct conflict with *McCallen v. Commonwealth of Massachusetts, supra,* and also in conflict with cases such as *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1 (1977).

McCallen has admittedly been distinguished by other cases such as *Pacific v. Johnson,*[3] but the important distinction betwen the two is factual, not legal, and is found in the differing fact situations underlying the two cases. In *McCallen,* Massachusetts had issued bonds which were exempt from payment of a then existing corporate excise tax, similar to Indiana's, payable by all corporations. That law was later amended to eliminate the prior express exemption from payment of such excise tax on municipal bond income and U.S. Government bonds. Such amendment was held to violate the state's contracts with its bondholders. In comparison, in *Pacific v. Johnson* the municipal bondholder was seeking to be relieved of a tax which was not in existence when the exemption was drafted and the bonds sold. The Supreme Court sustained the California Supreme Court's decision that the fifty year-old exemption did not extend to the new tax. Here we have a situation, like *McCallen* and unlike *Pacific v. Johnson.* FWNC claims, the state admits, and the Tax Court found that the indirect tax FWNC seeks to be relieved of is but the alter ego of similar indirect taxes from which FWNC's municipal bond income was exempt when it bought its bonds. FWNC points to the amendment of the GES as evidence that the exemption it had relied upon, the GES, had been amended just as in *McCallen.* To petitioner's knowledge, there is no case distinguishing *McCallen* and following *Pacific* on similar

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[3] Much of the negative citation in fact involved an issue separate from pure classic Contract Clause analysis relating to discrimination against federal obligations. *See, e.g., Washington v. United States,* 460 U.S. 536 (1983).

facts, *i.e.*, where the state was directly or indirectly revoking a prior tax exemption.[4]

In *United States Trust Co of New York v. New Jersey, supra,* the issue was the ability of the New Jersey legislature to weaken the strength of a statutory limitation on operating deficits by a public entity which had issued certain public bonds, rendering those bonds less secure and less valuable. By weakening the limitation on such deficits the New Jersey legislators negatively impacted the potential amount of net revenue statutorily committed to payment of principal and interest on the bonds, and New Jersey in effect materially altered a valuable privilege which, although embodied in prior legislation, was held by this Court to be incorporated in the bond contracts. Here the Indiana legislature has totally withdrawn a valuable privilege, namely, freedom from Indiana taxes, which impacts significantly upon the value of the bonds in the hands of the holders, and this was also a statutorily based privilege available essential to and incorporated by reference either implicitly or explicitly in the tax opinion contained on the bond form in all bonds held by FWNC. Once it becomes apparent that the Indiana GES had previously covered "indirect" taxes, the decision below of the Indiana Supreme Court is directly contrary to these two cases.

United States Trust Co. also speaks meaningfully to the proper standard of deference to be accorded the measure under review where, as here, the state's own obligations are at issue.

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[4] In *First American National Bank v. Olsen,* 751 S.W.2d 417 (Tenn. 1987), the Tennessee Supreme Court failed to protect public bondholders after an apparent legislative about-face, but that case had a complicating factor. There was an outstanding decision of that state's Supreme Court *antedating the issuance of the bonds* which had held that the state exemption statute for municipal bonds did not apply to franchise tax, *National Life & Accident Ins. Co. v. Dempster,* 168 Tenn. 446, 79 S.W.2d 564 (1935).

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co., supra, at pp. 25-26.

II. THE DECISION BELOW PERMITS THE STATE TO RENEGE AND TO IMPAIR ITS BOND (AND OTHER) CONTRACTS

The Indiana Supreme Court, questioned whether the GES had been incorporated in the Taxpayer's Bond contracts and ignored decisions of this Court, *see, e.g., United States Trust Co. of New York v. New Jersey, supra; Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934), and of the Indiana Supreme Court, *see, e.g., Read v. Beczkiewicz,* 215 Ind. 365, 18 N.E.2d 789 (1939), clearly recognizing that existing law is normally incorporated in bond contracts. Since the Supreme Court determines and is not bound by the state court's ruling on the existence of a contract, *State of Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938); *Appleby v. City of New York,* 271 U.S. 364, 380 (1926), the Indiana Supreme Court's decision must bow to the rules of incorporation recognized and applied in the foregoing decisions. Similarly this Court is not bound by a State Court characterization or construction of its own tax law but determines for itself the reality of a state's tax laws when constitutional issues are involved. See e.g., *Society For Savings In City For Cleveland v. Bowers,* 349 U.S.

143 (1955); *Citizens Bank of Louisiana v. Parker,* 192 U.S. 73 (1902).

At the outset one needs first ask why should this court concern itself with correcting a State Court in interpretation of its own state law. What then is the true importance, the true reason why this Court should correct the decision of the Indiana Supreme Court interpreting a law governing its own obligations? First of all, as noted above, the impairment was material and went to the essence of the bargain. Secondly, the decision potentially impacts the interests of the many, many similarly-situated bondholders holding literally billions of dollars of Indiana municipal bonds and trillions of dollars of such bonds when other states' bondholders are considered. Thirdly, the case has significance well beyond the particular type of contract. It extends to all types of state contracts the essential terms of which are provided in large part by underlying legislation, including both employment contracts and pensions for state and local employees in Indiana and elsewhere.

Claims on states through their municipal bonds and through their state employee salaries and pensions represent a large part of the collective wealth of Americans. These rights are subject to manipulation in a variety of ways which threaten the sanctity of the contract involved. Recently, we have had attempted state pay reductions, *see, Condell v. Bress,* 983 F.2d 415 (2d Cir. 1993), *cert. denied Bress v. Condell,* 6113 S. Ct. 1849 (1993) (federal court strikes down as in violation of Contract Clause), *see also, In Re Workers' Compensation Refund Western National Mutual Ins. Co.,* 46 F.3d 813 (8th Cir. 1995) (Insurers surplus fund protected); we have had pension "revision" eliminating a tax exemption, *see Hughes v. Oregon,* 314 Or. 1, 838 P.2d 1018 (1992) (state court effectively sanctioned impairment in large part by declaring law to be merely a breach, not an impairment for which an unspecified remedy would be pro-

vided. U.S. Contract Clause held ineffective to prevent because there was breach not impairment); we have had a state decision invalidating the contracts on which municipal bonds depended, *see, Chemical Bank v. Wash. Pub. Power Supply,* 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied, Haberman v. Chemical Bank,* 471 U.S. 1065 (1985), *see also, Booth v. Sims,* 456 S.E.2d 167 (1994), [Supreme Court of Appeals of West Virginia] (pension reduction sustained in part, held invalid in part); and now, in this case, we have "takebacks" of tax exemptions as respects outstanding bonds originally sold as tax-exempt and at below market interest rates by reason of such exemption, *Indiana Dep't of Revenue v. Fort Wayne Nat'l Corp., supra.* Constitutionally-protected contract rights of bondholders are ordinarily not involved in repeals of tax exemptions, but they are here where the exemption is incorporated in and becomes a part of the state's own bond contract. Indeed, as the Court aptly commented in the above quotation from *United States Trust Co. v. New Jersey, supra,* watering down a state's own financial obligations is an area where the legislative action is subject to special scrutiny. *Ibid.* at pp. 25-26.

A comparison of the state court cases cited above with the differing results obtained in federal court cases cited above suggests that the U.S. Supreme Court should be especially vigilant where a state's own obligations are involved and where a claimant's remedies are restricted, as FWNC's were in this case, to an action in a state court. The temptation of the lower state court to defend the state's treasury may be almost as great as its legislature's. Indeed, a review of the foregoing state courts' treatment of recent Contract Clause claims reveals the emergence of various theories of impinging on the rights of persons holding contracts with the state. For example, in *Hughes v. Oregon, supra,* the Supreme Court found the provision repealing the exemption did not effect an infringement but only a breach of the contract, for which some unspecified remedy was available. Presumably this would be in dam-

ages, which would likely be less valuable to the Petitioners than striking down the law. More obliquely, in *Booth v. Sims, supra,* the West Virginia Supreme Court declared that it would announce when the state employees had participated in the system long enough to have substantially relied to their detriment so as to entitle them to protection. *Ibid.* at pp. 184-185.

Here, as discussed above, we have an attempt to make infringement disappear by accepting an improper "construction" of the original GES statute which is contradicted by the same court's own construction of the nature of the Gross Income Tax in an earlier similar case. If the Contract Clause is to have real meaning to prevent a state's financial abuse in respect of its own financial obligations, the Supreme Court should act to prevent these distortions of the generally understood meaning of the Contract Clause. This is not an area in which the Court can rely upon the political process in the states to provide the necessary protection.

The particular issue on which impairment turns in this case, resolved in FWNC's favor by the Indiana Tax Court and adversely to FWNC by the Indiana Supreme Court, was the scope of Indiana's GES, specifically whether it had prior to 1989 included indirect taxes or not. The Indiana Supreme Court reached its conclusion that the GES had not covered indirect taxes by totally ignoring the overwhelming weight of historical evidence that the GES had previously covered indirect tax (the aforesaid Gross Income Tax, for one) and ignoring all of the various rules of construction found applicable by the Indiana Tax Court, which had led it to the conclusion that the GES had covered such taxes.

In effect, the Indiana Court chose to prefer the canon of seeking to reconcile two apparently conflicting statutes over four or five competing canons of construction pointing directly to an irreconcilable conflict between the two statutes. The problem with the Supreme Court's decision

is that nowhere does it explain how the GES had come to cover only direct and not franchise and other indirect taxes, when it clearly had covered at least one indirect privilege tax, the Indiana Gross Income Tax, and when the Indiana legislature thought it necessary to amend the GES by adding an additional exception for the FIT to be certain the GES did not apply.[5] What we have, then, is a state court reaching a result favorable to the state and its treasury by interpreting its own state's law in a manner which flatly contradicts the previously commonly accepted understanding of that law, indeed contradicts its own characterization of the Gross Income Tax. This Court is not required to accept the Indiana Supreme Court's assertion that the emperor is wearing clothes. It is free, indeed obligated, as recognized in *Citizens Bank* and *Society for Savings*, *supra*, to expose the nakedness of the lower state court's ruling in the course of carrying out its duty of protecting the affected Bondholder's constitutionally-protected rights against legislative impairment of its various bond contracts.

This role of the U.S. Supreme Court was set forth by it in another case arising from Indiana in which the Indiana Supreme Court had, by restrictively reinterpreting earlier state statutes which were the foundation of the realtor's alleged contract rights, denied the existence of a contract. *See*, *State of Indiana ex rel. Anderson v. Brand*, *supra*. Rejecting the Indiana Supreme Court's interpreta-

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[5] The original GES as it existed up until 1989 contained only one express exclusion—for inheritance tax, which is a form of indirect or privilege tax. See pp. 2-3 and App. C, p. 30a. In 1990 the Indiana legislature amended the GES and twenty or more similar exemptions for specific types of bonds to add the FIT as an additional specifically recognized exception to the general rule of exemption. See App. C, pp. 30a-31a. In 1991 it further revised the GES and the other bond statutes by deleting the 1990 specific exception for FIT tax from paragraph (a) of Ind. Code 6-8-5-1 and by adding it as new subsections (c) and (d). See App. C, pp. 31a-32a.

tion of Indiana Law on which its decision was based, this Court held:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the state's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts."

Ibid., at 100 (footnote omitted).

Under the lower state Court's theory of reconciliation by judicial rewriting, there would never be a legislative impairment of a state law which had been incorporated in a contract because the reconciling "construction" of the earlier statute to comport with the later conflicting, in substance amending, statute in effect rewrites that earlier legislative contract to eliminate an otherwise obvious impairment. Clearly the impairment is no less legislatively driven where the legislature first passes a statute conflicting with an earlier one and then amends the earlier statute to eliminate the conflict, stating at the same time that the amendment was unnecessary, and the state court then simply accedes to such legislative action. The concept of reconciling conflict between earlier and later statutes [6] must give way to a recognition of constitutional rights arising under the earlier statute and protected by the Contract Clause and cannot become a basis for riding roughshod over those rights.

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[6] The theory underlying the canon of reconciliation, which assumes that the later legislature knew what was intended by an earlier legislature, breaks down entirely where, as here, not one member of either body of the Indiana legislature which passed the first statute held such office when the conflicting statute was passed thirty years later.

The question for the Supreme Court then becomes whether the Indiana Supreme Court's conclusion that the GES had not covered indirect taxes is credible. The evidence that it is not is found in a comparison of those portions of the two lower court decisions bearing on this particular issue. *Compare Fort Wayne Nat'l Corp. v. Ind. Dep't of Revenue*, *supra*, at 668, 671-672, [App. B, pp. 16a-19a] (on the issue of the scope of the GES) *with Indiana Dep't of Revenue v. Fort Wayne Nat'l Corp.*, *supra* at 109, 112-114 [App. A, pp. 7a-10a] (on this same issue). The Tax Court's opinion addressed multiple canons of construction. The Indiana Supreme Court does not. The Tax Court focuses on the prior coverage by the GES of the Gross Income Tax. The Indiana Supreme Court leaves it unexplained. Indeed, that Supreme Court spends its greatest effort refuting a straw-man argument, which it claims FWNC made to the effect that by enacting the GES the State legislature had intended to exempt its banks from federal taxation. *See Ibid.* at p. 113. See App. A, pp. 7a-9a. *In fact, FWNC never, ever made any such argument.* Such analysis answers the question. The decision of the Indiana Supreme Court is simply wrong and not entitled to acceptance by this Court. More importantly as discussed above, it is the role of this Court in our system to protect the Constitution against state court decisions which would erode its provisions, particularly where persons asserting these rights must do so in state courts.

III. THE DECISION BELOW LEFT UNANSWERED THE IMPORTANT QUESTION WHETHER THE CIVIL RIGHTS ACT IS AVAILABLE FOR A VIOLATION OF THE CONTRACT CLAUSE OF THE CONSTITUTION

The inclusion or non-inclusion of the Contract Clause in the scope of protection afforded by the Civil Rights Act is an issue lower courts have resolved in different ways. *Compare Poirier v. Hodges*, 445 F. Supp. 838

(M.D. Fla. 1978), *with District Council 33 v. City of Philadelphia*, Civ. No. 92-3579, 1993 U.S. Dist. LEXIS 944 (E.D. Pa. 1993).

The Indiana Tax Court in its analysis on the issue below concluded that, even if there was a contract which had been legislatively impaired, relief was still not available under 42 U.S.C. § 1983 because, among other reasons, the case fell within the rule of *Carter v. Greenhow*, *supra*; *see*, *Fort Wayne Nat'l Corp. v. Ind. Dep't of Revenue*, *supra* at fn 6, p. 676. It interpreted *Carter v. Greenhow* as holding that the Civil Rights Acts did not extend to Contract Clause claims. Indeed, the idea that *Carter v. Greenhow* stands for such a result has achieved fairly wide currency. Both because of the differing results reached and because the negative side of such analysis fundamentally mistakes the Court's recent decisions on the scope of the Civil Rights Acts, 42 U.S.C. § 1983 in cases such as *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1970), (both involving constitutionally-based rights), the Court should resolve this issue in favor of the incorporation of the Contract Clause within the scope of rights protected by the Civil Rights Acts.

The case of *Carter v. Greenhow*, properly construed, does not stand for the holding that the Indiana Tax Court and others have ascribed to it. Essentially, what the court in *Carter v. Greenhow* held was that the plaintiff had followed the wrong procedure for asserting his rights. As the Court said at p. 332 of its opinion, "But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it." This is the reading of *Carter v. Greenhow*, which the majority in *Dennis v. Higgins*, *supra*, adopted. *See*, *Ibid.* at p. 451 n.9.

Furthermore, the ruling in *Dennis v. Higgins* that the provisions of 42 U.S.C. § 1983 applied to actions to assert the protection of the Commerce Clause against

state action should control the result with respect to the Contract Clause. This was recognized by the dissenters in *Dennis v. Higgins*, *supra*, who, in protesting the interpretation of the Civil Rights Act as providing protection of the Commerce Clause, noted referring to *Carter v. Greenhow*, "The Commerce Clause is, if anything, a less obvious source of rights [than the Contract Clause] for purposes of § 1983, as its text only implies a limitation upon state power." *Dennis v. Hughes*, *supra*, at p. 458.

Accordingly, FWNC urges this Court to accept this case and resolve this important issue in favor of inclusion of the Contract Clause within the scope of the Civil Rights Acts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the judgment of the Supreme Court of Indiana. Alternatively petitioner suggests that, even if the issues involved do not merit plenary consideration by the Court, the interest of this Court in protecting both the Contract Clause and its decisions on such clause from subversion by decisions such as the present would warrant a summary reversal of the decision of the Indiana Supreme Court and either an affirmance of the Indiana Tax Court's decision or a remand with a direction to the Indiana Supreme Court to reconsider the case on the assumption the GES had covered indirect taxes and that *United States Trust Co. of New York v. New Jersey* applies. Such treatment was deemed appropriate in *Norwest Bank of Duluth NA v. James*, 501 U.S. 1246 (1991) and *Norwest Bank Duluth NA v. McClung*, 113 S. Ct. 3026 (1993), each involving very similar issues, and would be appropriate here.

Respectfully submitted,

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APPENDIX A

[Filed Apr. 10, 1995]

IN THE SUPREME COURT OF INDIANA

No. 49S10-9406-TA-521
Supreme Court
No. 49T10-9204-TA-17
Tax Court

INDIANA DEPARTMENT OF STATE REVENUE, and KENNETH L. MILLER, in his Capacity as Commissioner of the Indiana Department of State

Appellants,

v.

FORT WAYNE NATIONAL CORPORATION,

Appellee.

Appeal from the Indiana Tax Court
The Honorable Thomas G. Fisher, Judge
Cause No. 49S10-9204-TA-17

ON PETITION TO TRANSFER

DEBRULER, Justice,

This case is an appeal of a summary judgment against the appellant, Indiana State Department of Revenue, granting Fort Wayne National's claim for refund of a portion of the Financial Institutions Tax (FIT) it paid for the 1990 calendar year. Specifically, appellee Fort Wayne National Corporation (FWNC) contended in the Tax Court that the Department is precluded from using

the income from municipal and federal bonds issued after March 11, 1959, and prior to January 1, 1990 in computing Fort Wayne National's tax liability by the General Exemption Statute (GES). The Tax Court granted appellee's motion for summary judgment under Ind. Trial Rule 56(B). *Fort Wayne Nat. v. Dept. of State Revenue* (1993), Ind. Tax, 621 N.E.2d 688. The Department has petitioned this court for review. The petition is granted.

Appellant's brief raises the following issues:

(1) whether the FIT operates as a direct tax on the municipal and federal bonds by using them to measure the taxpayer's FIT liability;

(2) whether the GES precludes the FIT from including the current income of federal and municipal bonds in the determination of the amount of tax to be paid;

(3) whether including federal bond income in the determination of FIT liability violates the non-discrimination requirement of 31 U.S.C. § 3124; and

(4) whether the FIT impairs a contract in violation of the Contract Clause of the U.S. Constitution [1] by using the income from tax exempt municipal bonds to determine the taxpayer's FIT liability.[2]

FACTS

Fort Wayne National Corporation (FWNC), the taxpayer, is a financial institution domiciled in Indiana and is therefore subject to Indiana's Financial Institutions Tax (FIT). The General Assembly passed the FIT in 1990.

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[1] U.S. Const. art. 1, § 10.

[2] Although FWNC mentions art. 1, § 24 of the Indiana Constitution in the table of contents of its brief, the issue is not mentioned in the argument section of its brief. Because FWNC fails to specifically raise this issue in its argument, the issue is waived. Ind. App. Rule 8.3(A)(7); *Clemens v. State* (1991), Ind., 610 N.E.2d 236, 244.

That same year, the Assembly also added language to the General Exemption Statute, explicitly excepting the FIT from the GES. For the taxable year 1990, FWNC paid $1,973,936 toward its FIT liability. Later, FWNC filed a claim for refund in the amount of $685,533 plus interest. It claimed that the refund sought represented tax either improperly levied upon or measured by municipal and federal bond income from municipal bonds or federal bonds issued after March 11, 1959 and prior to May 1989. The Indiana Department of State Revenue neither granted nor denied the claim for refund within 180 days of its filing. FWNC filed the original tax appeal shortly thereafter. The parties have stipulated to the material facts.

Discussion

I. The Nature of the Financial Institutions Tax (FIT)

In order to determine the nature of the FIT, the starting point is the distinction between income, property, and excise taxes within American revenue systems. The United States Supreme Court has long recognized two great categories of taxes: direct or indirect. To the class of direct taxes belong taxes upon income and property; to the class of indirect taxes belong excises, duties, and imposts. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895). Historically, whether a federal tax was classified as a direct or indirect tax determined whether it was subject to either the apportionment clause or the uniformity clause of the United States Constitution.[3] For federal income taxes, the question of whether the federal income tax was a direct tax became superfluous with the passage of the Sixteenth Amendment.

The Indiana Courts have adopted the direct-indirect tax as well. The distinction between property taxes and

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[3] U.S. Const. art. 1, § 9, cl. 4, U.S. Const. art. 1, § 8, cl. 1, respectively. See generally MERTENS, LAW OF FEDERAL INCOME TAXATION, Vol. 1, Ch. 4, § 4.04.

excise taxes became an issue in the applicability of art. 10, § 1 of the Indiana Constitution to various state taxes. See *Lutz v. Arnold* (1935), 208 Ind. 480, 193 N.E. 840; *Miles v. Department of Treasury* (1935), 209 Ind. 172, 199 N.E. 372, *appeal denied*, 298 U.S. 640, 56 S. Ct. 750, 80 L. Ed. 1372 (1935). *Lutz* addressed the issue of whether a general intangibles tax was an excise tax or a property tax.[4] The court held that the general intangibles tax was an excise tax. The holding in *Lutz* hinged on the distinguishing characteristic of an excise tax, i.e., that it is "a tax imposed upon the performance of an act, the engaging in an occupation, *or the enjoyment of a privilege . . . .*" *Lutz*, 208 Ind. at 489, 193 N.E. at 844 (emphasis added). The distinction between a tax on property and an excise tax on the exercise of a privilege was also explicitly recognized:

> the tax imposed under the act is for the right to exercise one or more of the privileges as above set out. It does not attempt to impose the tax on property included in the class defined and it fixes the rate of the tax and the method of measuring the amount of the tax to be paid by each person subject to the tax. *The tax is not payable unless the privileges as set out are exercised and the exercising of the privileges is made the occasion for the tax.*

Lutz, 208 Ind. at 490-91, 193 N.E. at 844 (emphasis added). Similarly, this Court ruled in *Miles* that the Gross Income Tax Act of 1933 created an excise tax, rather than a property tax:

> We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derived income from sources within the state, *upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the*

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[4] Throughout the case law, the term "excise tax" is a collective term which denotes a number of various indirect taxes, including franchise and privilege taxes.

> *burden may reasonably be measured by the amount of income.*

Miles, 209 Ind. at 188, 199 N.E. at 379. Given our holding in *Miles*, it is manifest that an excise or franchise tax may be measured by a taxpayer's income without being construed as an income tax. Moreover, municipal bonds that are exempt from direct state and federal taxation can be used to measure a taxpayer's excise tax liability. *Storen et al v. J. D. Adams Mfg. Co.* (1937), 212 Ind. 343, 7 N.E.2d 941, *reh'g denied, rev'd in part, aff'd in part*, 304 U.S. 307, 58 S. Ct. 913, 82 L. Ed. 1365 (1938). The United States Supreme Court has also ruled that federal obligations otherwise exempt from direct state taxation may be included in the determination of a corporation's "net worth" for purposes of a state franchise tax:

> Appellant argues further that even if this is a franchise tax, it must fall because its effect is the same as if it had been imposed directly on the tax-exempt federal securities. Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations. And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property.

Werner Machine Co., Inc. v. Director of Division of Taxation, 350 U.S. 492, 493-94; 76 S. Ct. 534, 535; 100 L. Ed. 634, 637 (1956) (per curiam). Thus, direct taxes on income and indirect taxes, such as excise taxes, are afforded very different treatment under both federal tax law and the tax law of Indiana.

FWNC claims that the FIT is a direct tax on its federal and municipal bonds issued after March 11, 1959 and before January 1, 1990, as well as the income from those bonds, and that the application of the FIT to those bonds is an impermissible, "retroactive" tax. The Department, on the other hand, argues that the FIT does not tax the bonds; rather, the FIT is an excise that taxes a financial institution's privilege of conducting business in Indiana. The FIT itself reads as follows:

> There is imposed on each taxpayer *a franchise tax measured by the taxpayer's adjusted gross income or apportioned income for the privilege of exercising its franchise or the corporate privilege of transacting the business of a financial institution in Indiana.*

IND CODE ANN. § 6-5.5-2-1(a) (West Supp. 1994) (emphasis added). The statute determines the amount of the tax for the taxable year by multiplying eight and one-half percent (8.5%) times the remainder of

> (1) the taxpayer's adjusted gross income or apportioned income; minus
>
> (2) the taxpayer's deductible Indiana net operating losses as determined under this section; minus
>
> (3) the taxpayer's net capital losses minus the taxpayer's net capital gains . . . multilied by the apportionment percentage applicable to the taxpayer . . . for the taxable year of the loss.

Id. Thus, the basis of this particular tax reflects the extent to which a financial institution enjoys the privilege of operating as a financial institution in Indiana. If this tax were truly a direct property tax, it would be imposed regardless of whether the taxpayer realized net returns or not. *Storen*, 212 Ind. at 358, 7 N.E.2d at 947. If this tax were a direct tax on appellant's bonds and their income, the fact that the taxpayer was coincidentally exercising its corporate privilege in Indiana would also be irrelevant.

In determining the nature of any state tax, "the declaration in a statute that the tax is of a particular nature, while not conclusive, is very important and must given consideration in construing the statute." *Lutz*, 208 Ind. at 490, 193 N.E. at 844. The nature of the FIT is not to be assumed; rather, it must be supported. FWNC appears to claim that the economic effect of counting the bond income in the FIT calculation is the same as eliminating an exemption from direct taxation, and therefore, we should treat the FIT as a direct tax on the bonds themselves. While the economic effect may be similar in that FWNC's total liabilities have increased as a result of the new tax regime, the law clearly distinguishes between the elimination of an incidental tax benefit and the actual imposition of a new tax. An additional claim is made that the FIT somehow inherited treatment as a direct tax from some of the various taxes it supplanted. Neither one of these claims, however, suffices to convince us that the FIT is anything other than an excise tax upon the privilege of operating as a corporate financial institution in the state of Indiana. Given past jurisprudence, the plain language of the statute, and its nondiscriminatory formula for calculating the individual's tax liability, the FIT is not a direct tax on the federal and municipal bonds, but rather an excise tax on the exercise of the corporate privilege of operating as a financial institution in Indiana.

II. The Scope of the General Exemption Statute (GES)

FWNC contends that the General Exemption Statute prevents the Legislature from using income from federal municipal bonds issued after March 11, 1959 and prior to January 1, 1990 in the determination of its tax liability under the FIT.[5] The Department argues that the Legislature intended the GES to apply to only income and property taxes on the bonds and therefore does not

[5] 31 U.S.C. § 3124(a) is incorporated into the GES by IND. CODE ANN. § 6-5.5-1-2(a)(1) (West Supp. 1994).

preclude the State from including FWNC's bonds and the income from those bonds in the determination of its tax liability under the FIT. Thus, the scope of the GES is at issue.

In construing the GES, the first focus is upon the statutory language itself. The GES, as written when FWNC's municipal bonds were issued, reads as follows:

> All bonds issued after March 11, 1959, . . . issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public, or quasi-public corporation or body . . ., the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.

In 1990, the Legislature amended the GES to explicitly except the FIT from its purview. IND CODE ANN. § 6-8-5-1 (West Supp. 1994). FWNC argues that the addition of this amendment shows that the Legislature originally intended the GES to exempt federal and municipal bonds from the calculation of the FIT. Additionally, FWNC claims that the phrases "and the receipt of such interest and proceeds" and "for all purposes" indicate that the Legislature intended to exempt the municipal bonds from *all* state taxation, direct or indirect. The Department, on the other hand, argues that the amendment merely served to clarify the Legislature's true intention that the GES was only intended to apply to direct taxes. It also argues in the alternative that interpreting the GES to apply to the FIT would contradict the FIT's clear

language that interest from both federal and municipal bonds be included in the calculation.[6]

The primary task when construing statutes is to determine and implement the intent of the Legislature. *Superior Const. Co. v. Carr* (1990), Ind., 564 N.E.2d 281. Tax exemption statutes must be construed strictly against the one claiming the exemption. *Gross Income Tax Division v. National Bank & Trust Co.* (1948), 226 Ind. 293, 79 N.E.2d 651. The first guide in determining the intent of the Legislature is the language of the statute itself. *State ex rel Roberts v. Graham et al.* (1953), 231 Ind. 680, 110 N.E.2d 855. When harmonizing two ostensibly conflicting statutes, the law has held that "[w]here there is a conflict between statutes, the more recent statute is controlling and a specific provision prevails over a general provision relating to the same subject matter." *Houtchens v. Lane* (1965), 246 Ind. 540, 545-46; 206 N.E.2d 131, 134, *reh'g denied.*

It is evident that the Legislature never intended the GES to preclude using tax exempt bond income from the calculation of the FIT. Only by a crabbed reading of the statute might one read the statute to entail that the Legislature not only intended to exempt the bonds and their income from all state taxation, direct or indirect, but also to exempt the bonds from any *federal* taxation, direct or indirect. Taken to its logical conclusion, such an interpretation would lead to the absurdity that the State was somehow "promising" exemptions that were not in its power to give. We do not believe the

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[6] For the purposes of the FIT, IND. CODE ANN. § 6-5.5-1-2 (West Supp. 1994) defines adjusted gross income as "taxable income as defined in Section 63 of the Internal Revenue Code, adjusted as follows:

(a) (8) Add the amount of interest excluded under Section 103 of the Internal Revenue Code or under any other federal law, minus the associated expenses disallowed in the computation of taxable income under Section 265 of the Internal Revenue Code."

Legislature ever intended such an interpretation. As we have stated in the past,

> a statute must be reasonably and fairly interpreted so as to give it efficient operation, and to give effect if possible to the expressed intent of the legislature. It should not be wantonly narrowed, limited or emasculated and rendered ineffective, absurd or nugatory.

State v. Griffin (1948), 226 Ind. 279, 284; 79 N.E.2d 537, 540. Additionally, in spite of FWNC's assertion that the "the receipt of such interest and proceeds" phrase demonstrates a legislative intent to apply the GES to indirect taxes such as the FIT, we believe that such a construction is precisely the kind of mistake to be avoided in construing a statute. FWNC's claims of "retroactivity" lack force and support when one considers both the nature of the FIT and a reasonable interpretation of the GES. As we construe the statutes, the FIT only uses current bond income to measure the taxpayer's liability. Because the tax is levied on the franchise and not the bonds and their income, there is no retroactivity. Therefore, we hold the only reasonable harmonization of the two statutes is that the GES must read to only exempt the bonds from *direct* taxation, and not from the FIT.

III. 31 U.S.C. § 3124

FWNC also claimed in the Tax Court that the inclusion of its bonds in the FIT calculation would violate 31 U.S.C. § 3124 by imposing a discriminatory tax against its federal bond income.[7] There is no discrimina-

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[7] 31 U.S.C. § 3124 (1988) provides in pertinent part:

(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except—

(1) a non-discriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and

(2) an estate or inheritance tax.

tion here. The United States Supreme Court has clearly stated that a state "does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them." *Washington v. United States*, 460 U.S. 536, 544-45, 103 S. Ct. 1344, 1350, 75 L. Ed. 2d 264, 272 (1983). As § 3124 allows, both Indiana municipal bonds and federal bonds are included in the calculation of the taxpayer's liability under the FIT. Thus, the holder of the federal bonds is in no worse a position than the holder of Indiana municipal bonds. Even before the passage of § 3124, the United States Supreme Court held that a non-discriminatory franchise tax may include federal bonds in the determination of a taxpayer's corporate franchise tax liability. *See Pacific Co. v. Johnson*, 285 U.S. 480, 52 S. Ct. 424, 76 L. Ed. 893 (1932); *Werner Co. v. Director of Taxation*, 350 U.S. 492, 76 S. Ct. 534, 100 L. Ed. 634 (1956); *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 103 S. Ct. 3369, 77 L. Ed. 2d 1072 (1982), *reh'g denied* 463 U.S. 1250, 104 S. Ct. 39, 77 L. Ed. 1457 (1983). Both state and federal bonds are treated exactly alike under the FIT. They are used to determine the extent of the taxpayer's exercise of the privilege of doing busines as a financial institution in Indiana.

IV. The Contract Clause Claim

FWNC also claims that the inclusion of municipal bond income in the FIT calculation would constitute an unconstitutional impairment of a contract violating art. 1, § 10 of the United States Constitution and that such an impairment is actionable under 42 U.S.C. § 1983.

We must determine in what sense, if any, a contract was created by between the State and the taxpayer and what were the precise terms of this contract. FWNC seems to claim that the GES, as it interprets the statute, was incorporated into the terms of the bonds at the time of issue. As we have noted in the past,

> [t]he intent of the legislature to enter into a contract with an artificial body of its creation ought to be apparent from the law which is alleged to constitute the contractual obligation. When that law is a special act addressed to a particular group of incorporators to meet a specific need or purpose the intent to contract is more easily discerned than when the law is general, addressed to no one in particular but available to all of a class as a vehicle for incorporation so long as it stands unrepealed.

Grand Lodge Hall Ass'n v. Moore (1945) 224 Ind. 575, 579, 70 N.E.2d 19, 20; 67 S. Ct. 1088, 1201. In that same opinion, this Court cited a quote from Justice Holmes that guides our decision today:

> The broad ground in a case like this is that, in view of the subject-matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. *In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefor(e), it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change.*

Id., 224 Ind. at 581, 70 N.E.2d at 21, quoting *Wisconsin & Michigan R. Co. v. Powers,* 191 U.S. 379, 387; 24 S. Ct. 107, 108; 48 L.Ed. 229, 231 (1903) (emphasis added). The language of the GES contains neither a promise that the exemption from direct taxation on the bonds would not be repealed or subject to modification for perpetuity, nor a promise that the GES would exempt bonds from even being used to measure a franchise tax, such as the FIT. Even if the GES was incorporated into the bond contract, it would not have prevented the Legislature from using the bond income to measure the FIT liability. The bonds and their income are still exempt

from direct state taxes. The promise contained in those bonds was the promise of a given return as a percentage of their purchase price. Thus, the use of the federal and municipal bond income to measure the taxpayer's FIT liability was not an unconstitutional impairment of a state obligation.

Conclusion

We grant the Department of Revenue's petition for review, vacate the judgment of the Tax Court, and affirm the Department's denial of the refund.

SHEPARD, C.J., and DICKSON and SELBY, JJ., concur.

SULLIVAN, J., did not participate in this case.

APPENDIX B

IN THE INDIANA TAX COURT

Case No. 49T10-9204-TA-00017

FORT WAYNE NATIONAL CORPORATION,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE, and KENNETH L. MILLER in his capacity as Commissioner of THE INDIANA DEPARTMENT OF STATE REVENUE,
Respondents.

APPEAL FROM A FINAL DETERMINATION OF THE INDIANA DEPARTMENT OF STATE REVENUE

FISHER, J.

The Petitioner, Fort Wayne National Corporation (Fort Wayne National), appeals the final determination of the Respondent, the Indiana Department of State Revenue (the Department), denying Fort Wayne National's claim for refund of a portion of the Financial Institutions Tax (the FIT)[1] it paid for calendar year 1990. The matter is before the court on the parties' cross motions for summary judgment.

ISSUES

The parties' motions raise the following issues:

I. Whether the Department properly included the income on certain municipal bonds in calculating Fort Wayne National's FIT liability.

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[1] IND. CODE 6-5.5-1-1 through 6-5.5-9-5.

II. Whether the FIT violates the nondiscriminatory requirement of 31 U.S.C. § 3124(a).

III. Whether Fort Wayne National has a claim under 42 U.S.C. § 1983.

FACTS

The parties have stipulated the material facts. Fort Wayne National is a bank holding company with various wholly owned subsidiaries. Fort Wayne National and its wholly owned subsidiaries filed a consolidated return for the 1990 taxable calendar year. For 1990, Fort Wayne National paid $1,973,936 in FIT, $1,841,736 out of pocket and $132,200 in credits. The credits are not at issue.

Fort Wayne National paid $685,533 of the total under protest and filed a claim for refund seeking that amount plus interest on October 16, 1991. The disputed amount represents the FIT attributable to municipal and federal bond income on bonds issued before May 1989. The Department neither granted nor denied the claim within 180 days of its filing and Fort Wayne National filed this appeal on April 20, 1992.

DISCUSSION AND DECISION

At the outset, the court reiterates the familiar standard of review for summary judgment motions. When reviewing a motion for summary judgment, the court is to grant the motion only if no genuine issue of material facts exists and a party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue* (1992), Ind. Tax, 605 N.E.2d 1222, 1224 (citing *C & C Oil Co. v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 570 N.E.2d 1376, 1378). "[E]ach party to a summary judgment motion must designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, mat-

ters of judicial notice, and any other matters on which it relies for purposes of the motion." *Rosi v. Business Furniture Corp.* (1993), Ind., 615 N.E.2d 431, 434 (quoting T.R. 56(C)). If, after reviewing the designated evidentiary materials, the court determines no genuine issue of material fact exists, either the movant or the non-movant may be granted summary judgment. *C & C Oil Co.*, 570 N.E.2d at 1378 (citing *Indianapolis Pub. Transp. Corp. v. Indiana Dep't of State Revenue* (1987), Ind. Tax, 512 N.E.2d 906, 907, *aff'd* (1990), Ind., 550 N.E.2d 1277).

I.

MUNICIPAL BOND INCOME

Fort Wayne National is a financial institution that carried on business within Indiana during 1990. Fort Wayne National was, therefore, subject to the FIT. *See* IND. CODE 6-5.5-1-17; 6-5.5-2-1. The FIT, which took effect on January 1, 1990, is an 8.5% levy on the remainder of a taxpayer's apportioned income or adjusted gross income minus the taxpayer's deductible Indiana net operating losses and net capital losses for the privilege of exercising its franchise or transacting business within Indiana. IC 6-5.5-2-1(a).

Fort Wayne National had municipal bond income in 1990 and now claims that income is exempt from the FIT by virtue of IND. CODE 6-8-5-1, the General Exemption Statute (the GES). At the time Fort Wayne National's municipal bonds were issued, the GES provided in pertinent part:

> *All* bonds issued after March 11, 1959, or note,s warrants, or other evidences or indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher leraning, or any other political, municipal, public or quasi-public corpora-

> tion or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and *the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.*

IC 6-8-5-1(a) (emphasis added). When construing a statute, the court is to give the statutory words and phrases their plain, ordinary, and usual meaning unless the legislature's intent reveals a contrary purpose. *State v. Hartman* (1992), Ind., 602 N.E.2d 1011, 1013; *Johnson County Farm Bureau Coop. Ass'n v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 568 N.E.2d 578, 580-581, *aff'd* (1992), Ind., 585 N.E.2d 1336. The court strictly construes statutes creating exemptions from tax against the taxpayer, but must nonetheless always bear the legislature's intent in mind to avoid reading an exemption so narrowly that its application is defeated in cases rightly falling within its ambit. *Harlan Sprague,* 605 N.E.2d at 1225 (citing *General Motors Corp. v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 578 N.E.2d 399, 404, *aff'd* (1992), Ind., 599 N.E.2d 588).

The GES provides that municipal bond income "shall be exempt . . . for *all* purposes except the state inheritance tax." IC 6-8-5-1 (emphasis added). When used as an adjective, as it is in this portion of the GES, "all" means "every member or individual component of: each one of—used distributively with a plural noun or pronoun to mean that a statement is true of every individual considered . . . [as in] (a film suitable for all ages)." *Webster's Third New International Dictionary* 54 (1981). "Shall" within a statute has a mandatory rather than a directory

meaning unless it appears clear from the context or purpose of the statute that the legislature intended a different meaning. *United Rural Elec. Membership Corp. v. Indiana & Michigan Elec. Co.* (1990), Ind., 549 N.E.2d 1019, 1022 (citing *State ex rel. City of Indianapolis v. Brennan* (1952), 231 Ind. 492, 109 N.E.2d 409). No language could be plainer than these words in the GES, and notwithstanding that courts must construe exemptions narrowly, unambiguous language must be given its plain meaning. *See, e.g., Matter of Grissom* (1992), Ind., 587 N.E.2d 114, 116.

The main clause of the GES is sweeping in its scope. The legislature desired to enhance the marketability of Indiana municipal bonds and to that end exempted those bonds from all Indiana taxes but one. Indeed, the very existence of the exception for the state inheritance tax confirms the otherwise broad scope of the GES. Statutory exceptions and provisos serve to qualify or limit the plain meaning of a statute's main clause by restraining it to except something that would otherwise be within its scope. *See Kirkpatrick v. King* (1950), 228 Ind. 236, 246, 91 N.E.2d 785, 789 (quoting *McDougal v. State* (1915), 183 Ind. 168, 170, 108 N.E. 524, 525); *Ernst & Ernst v. Underwriters Nat'l Assurance Co.* (1978), 178 Ind. App. 77, 83, 381 N.E.2d 897, 900 (citing *State v. Shrode* (1949), 119 Ind. App. 57, 83 N.E.2d 900, 902).

The GES's command is clear and unambiguous. The municipal bonds at issue predate the FIT and were therefore exempt from all forms of taxation other than the inheritance tax by the express terms of the GES. *See* IC 6-8-5-1. In 1990, however, the GES was amended to include the FIT as well as the inheritance tax as exceptions to the exemption it creates. The issue therefore becomes the effect of the FIT and the 1990 amendment to the GES on the otherwise exempt status of Fort Wayne National's municipal bonds.

A. THE FIT

When the GES was enacted, the FIT did not exist, but that alone does not resolve whether the FIT falls within the ambit of the GES. The FIT is a "measured by" tax, that is, a tax measured by income. *See* IC 6-5.5-2-1.

Prior to the 1990 amendment, the GES excepted from its terms only the state inheritance tax. The exception of only the inheritance tax, like any statutory exception, must be strictly construed. (*Natural Resources Comm'n v. Porter County Drainage Bd.* (1991), Ind., 576 N.E.2d 587, 589 (citing *Common Council of Peru v. Peru Daily Tribune* (1982), Ind. App., 440 N.E.2d 726.) But it also implies the inclusion of all other taxes, including "measured by" taxes, which existed when the GES was promulgated. *See, e.g., Gross Income Tax Division v. Bartlett* (1950), 208 Ind. 505, 93 N.E.2d 174, *appeal dismissed* (1951), 340 U.S. 924, 71 S.Ct. 499, 95 L.Ed. 667. *See also Caylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 569 N.E.2d 765, 772-73, *aff'd* (1992), Ind., 587 N.E.2d 1311 (discussing the rule of construction of express inclusion and implied exclusion: the enumeration of certain items in a statute or regulation implies the exclusion of items not enumerated). The GES therefore included measured by taxes in its scope.

More importantly, though, the subject matter of the FIT was included within the original GES. The FIT is a replacement tax for the gross income tax, adjusted gross income tax, bank tax, savings and loan association tax, and the production credit association tax for financial institutions within the meaning of IC 6-5.5-1-17. *See* IND. CODE 6-5.5-9-4. Like all taxes other than the inheritance tax, these taxes were within the scope of the GES. Taxpayers subject to the FIT are no longer subject to the predecessor taxes. *Id.* The FIT, then, is simply a continuation, albeit in a new form, of taxes long in existence.

The status of the FIT is in stark contrast to that of the state income tax in *People ex rel. Clyde v. Gilchrist* (1923), 262 U.S. 94, 43 S.Ct. 501, 67 L.Ed. 883. In that case, New York law exempted debts and obligations secured by real property mortgages from all taxes except a recording tax. Many years after enacting the exemption, the state passed an income tax. The taxpayer claimed the income from the otherwise exempt obligations was exempt from the income tax as well. The New York courts and the United States Supreme Court all rejected the taxpayer's position, because, as the Justice Holmes succinctly stated, "no one thought of an income tax" when the exemption was passed. *Id.* at 98, 43 S.Ct. at 503, 67 L.Ed. at 893. *See also People ex. rel Central Union Trust Co. v. Wendell* (1921), 197 A.D. 131, 188 N.Y.S. 344. In the present case, on the other hand, not only was the subject matter of the FIT entirely within the contemplation of the legislature at the enactment of the GES, it was within the actual ambit of the GES, as well. The FIT is a replacement tax, and it would have been included in the GES but for the GES's amendment to except it.

B. THE GES AMENDMENT

In 1990, both the FIT and the GES amendment became effective.[2] As noted, the exception to the GES must be strictly construed. *Porter County Drainage Bd.*, 576 N.E.2d at 589. Nonetheless, the court must give the exception, like any other statutory language, its plain meaning. *See Johnson County Farm Bureau*, 568 N.E.2d

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[2] They both became effective on January 1, 1990. The FIT was adopted at the 1989 special session of the General Assembly and took effect on January 1, 1990. *See* P.L. 347-1989(ss), § 1. The GES amendment, however, was passed at the 1990 session of the General Assembly and given retroactive effect to January 1, 1990. *See* P.L. 21-1990, § 37. The history of the statutes is outlined in P.L. 68-1991 § 14. *See* Historical and Statutory Notes, IND. CODE 6-8-5-1.

at 580-581. Accordingly, all Indiana municipal bonds issued since the amendment are subject to the FIT as well as the inheritance tax. The GES amendment, however, cannot alter the status of bonds issued before the amendment.

One of the primary rules of statutory construction requires courts to give statutes prospective effect only, unless the legislature unequivocally and unambiguously intended retrospective effect as well. *State ex rel. Bd. of Dental Examiners v. Judd* (1990), Ind. App., 554 N.E.2d 829, 832 (citing *Turner v. Town of Speedway* (1988), Ind. App., 528 N.E.2d 858, 863). Amendments, too, are normally to operate prospectively, *Thomas v. Hemmelgarn* (1991), Ind. App., 579 N.E.2d 1333, 1338, *trans. denied*, and the courts of this state strongly disfavor retroactive application of even remedial amendments if existing rights would be infringed. *Brane v. Roth* (1992), Ind. App., 590 N.E.2d 587, 590, *trans. denied* (citing *Judd*, 554 N.E.2d at 832). Additionally, amendments that change statutory language, as these did, indicate a legislative intention to change the law. *Metropolitan School District v. Mason* (1983), Ind. App., 451 N.E.2d 349, 352 (citing *Indiana Alcoholic Beverage Comm'n v. Osco Drug, Inc.* (1982), Ind. App., 431 N.E.2d 823).

The Department claims its reading of the GES amendments raises no retroactivity questions because the legislature passed the FIT in 1989 to take effect beginning on January 1, 1990. True enough, the Department's interpretation does not call for the reopening of a taxpayer's records for earlier tax years. What it does call for, however, is the imposition of a "measured by" franchise tax that includes within its measurement the income from outstanding municipal bonds, bonds which were issued free of all state taxes save the inheritance tax. To read the GES amendments this way would, in essence, give the amendments retroactive effect, and the court declines the Department's invitation to read the amendments retroactively without clear legislative direction.

The FIT is a replacement tax, covering the same subject matter as previous taxes within the original GES, and existing in a long establishment format, *i.e.*, a "measured by" tax, which also lay within the original GES. It therefore falls within the ambit of the GES and its exception from the GES has prospective effect only. Accordingly, municipal bonds issued prior to January 1, 1990, are exempt from the FIT, and the Department improperly included Fort Wayne National's municipal bond income within the measurement of Fort Wayne National's FIT liability.[3]

II.

FEDERAL BOND INCOME

Fort Wayne National next claims the Department wrongly included its federal bond income within the measurement of the FIT Fort Wayne National owed for 1990. Federal law generally prohibits state taxation of federal obligations, but franchise taxes, like the FIT, are proper if they are nondiscriminatory.

> Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, or both, to be considered in computing a tax, except—
>
> (1) *a nondiscriminatory franchise tax* or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

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[3] The GES amendments were initially passed in 1990, retroactive to January 1, 1990. P.L. 21-1990, § 37. Bonds issued between January 1, 1990, and the date of actual passage may well rest on the same footing as bonds issued between March 11, 1959, and December 31, 1989, and be exempt from the measurement of the FIT. Fort Wayne National, however, owns no such bonds, and the court therefore leaves the question for another day.

31 U.S.C. § 3124(a) (emphasis added). This statute is essentially a codification of the constitutional rule first laid down by Chief Justice Marshall in *M'Culloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 prohibiting states from taxing the federal government. *See Memphis Bank & Trust Co. v. Garner* (1983), 459 U.S. 392, 397, 103 S.Ct. 692, 695, 74 L.Ed.2d 562, 567. *See generally* Paul Hartman, *Federal Limitations on State and Local Taxation* § 6:1 *et seq.* (1981 & Charles Trost, Supp. 1992).

The FIT, which is "a franchise tax measured by [a] taxpayer's adjusted gross income or apportioned income for the privilege of exercising its franchise or the corporate privilege of transacting the business of a financial institution in Indiana," IC 6-5.5-2-1(a), is nondiscriminatory on its face. The issue in the present case, however, revolves not around the FIT itself, but rather around the relationship between the GES and the FIT.

As the court has already held, the Department erred by including Fort Wayne National's municipal bond income in computing the FIT. That does not mean, however, that the Department discriminated against Fort Wayne National's federal bond income. A "[s]tate does not discriminate against the Federal Government and those with whom it deals *unless it treats someone else better than it treats them.*" *Washington v. United States* (1983), 460 U.S. 536, 544-45, 103 S.Ct. 1344, 1350, 75 L.Ed.2d 264, 272 (emphasis added) (footnote omitted). The Department included both Fort Wayne National's municipal bond income and its federal bond income in computing the FIT and therefore did not discriminate.

Had the inclusion of the municipal bond income in the FIT been allowed under the GES, the inclusion of the federal bond income would have been allowed under 31 U.S.C. § 3124(a)(1). The GES prohibits retroactive

inclusion of the municipal bond income, however, and the federal statute therefore prohibits inclusion of the federal bond income because "[a] state tax that imposes a greater burden on holder of federal property than on holders of similar state property impermissibly discriminates against federal obligations." *Memphis Bank & Trust Co.*, 459 U.S. at 397, 103 S.Ct. at 696, 74 L.Ed.2d at 567-68.

III.

42 U.S.C. § 1983

Finally, Fort Wayne National claims the Department's actions have been illegal, giving rise to a cause of action under 42 U.S.C. § 1983 (§ 1983).[4] Fort Wayne National makes two specific arguments. First, Fort Wayne National contends the Department violated 31 U.S.C. § 3124 by discriminating against its federal bond income. As the court has already held, however, the Department never discriminated against that income. The federal bond income suffered equally with Fort Wayne National's municipal bond income because of an erroneous interpretation of a state statute, the GES. Because there was no violation of the federal bond statute, Fort Wayne National has no § 1983 action. *See Parratt v. Taylor* (1981), 451

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[4] Initially enacted as § 1 of the Civil Rights Act of 1871, § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. In *Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 583 N.E.2d 214, this court held it had jurisdiction over § 1983 claims.

U.S. 527, 535-36, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420, 428-29.

Second, Fort Wayne National argues the GES as originally enacted constituted a contract preventing the State from altering the tax free status of the bonds in question. From this starting point, the argument rapidly leaps over a number of intellectual chasms to the conclusion that the Department is liable to Fort Wayne National under § 1983 for a violation of the Contract Clause, U.S. CONST. art. I, § 10. None of the leaps, however, is successful.[5]

After the GES had been in effect for several years, the legislature enacted IND. CODE 5-1-14-9 (the covenant statute), which provides in pertinent part:

> The general assembly *covenants that it will not adopt, amend, or repeal a statute in a way that impairs the rights and remedies of the owners of obligations,* until the obligations, interest on the obligations, interest on an unpaid installment of interest, and all costs and expenses in connection with an action or proceedings by or on behalf of the owners are fully paid and discharged.

IC 5-1-14-9(a) (emphasis added). Like the GES, the covenant statute applies to municipal bondholder rights. *See* IND. CODE 5-1. Unlike the GES, however, the covenant statute indicates a strong legislative desire to be bound.

When faced with two statutes covering the same subject matter, the court must attempt to harmonize them before applying any other rule of statutory construction. *Marion County Sheriff's Merit Bd. v. Peoples Broadcasting Corp.* (1989), Ind., 547 N.E.2d 235, 237. If the

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[5] Neither Fort Wayne National nor the Department has briefed this question as fully as a weighty constitutional question merits. Nonetheless, the question having been pleaded and argued, the court will consider it.

conflict is irreconcilable, the more specific statute controls over the more general. *State ex rel. Hatcher v. Lake Superior Court, Room Three* (1986), Ind., 500 N.E.2d 737, 739 (citing *Sanders v. State* (1984), Ind., 466 N.E.2d 424, 428).

To covenant is to "promise solemnly . . . [to] pledge in a formal agreement." *Webster's Third New International Dictionary* 524 (1981). The plain meaning of this specific covenant not to impair bondholder rights is that the legislature intended to create a contract. Were the court to find a contract in the GES, the need for, and effect of, the covenant statute would be nullified, and the court cannot presume the legislature to have enacted a nullity. *Monarch Steel Co. v. State Bd. of Tax Comm'rs* (1993), Ind. Tax, 611 N.E.2d 708, 713 (citing *Hinshaw v. Board of Comm'rs* (1993), Ind., 611 N.E.2d 637, 638). On the other hand, the GES and the covenant statute can be readily harmonized in accord with the command of *Peoples Broadcasting Corp.*, 547 N.E.2d 235. In its original and amended forms, the GES exempts municipal bonds from most taxes; the covenant statute promises, among other things, that the legislature will not alter the municipal bonds' exempt status after the effective date of May 5, 1989. *See* P.L. 1989-2, § 7. Moreover, when the legislature enacts a statute, courts presume the legislature acted in full knowledge of exising statutes on the same subject. *Johnson County Farm Bureau*, 568 N.E.2d at 583. The legislature, then, was aware of the GES when it enacted the covenant statute. Had the legislature intended the GES to act as a contract, there simply would have been no need to enact the covenant statute.

Finally, in *United States Trust Co. of New York v. New Jersey* (1977), 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92, the United States Supreme Court reviewed a New Jersey statute with language almost identical to that in the covenant statute. The Court held the statute

created a contract between the states of New York (which had a reciprocal statute) and New Jersey, as well as between each of the states and certain bondholders governing the disposition of revenues pledged to pay off the bondholders. *Id.* 431 U.S. at 18, 97 S.Ct. at 1516, 52 L.Ed.2d at 106-07. A subsequent statute changed the disposition of the pledged revenues, and the Court held the later statute violated the Contract Clause. *Id.* 431 U.S. at 19, 97 S.Ct. at 1516. 52 L.Ed.2d at 108.

A dozen years after the Court's decision, our general assembly enacted the covenant statute. *See* P.L. 1989-2, § 7. Normally, if a court of last resort has construed a statute and the legislature subsequently re-enacts that statute without changing the statutory language, courts presume the legislature adopted the earlier judicial construction. *See City of Indianapolis v. Schmid* (1968), 251 Ind. 147, 240 N.E.2d 66; *Department of Treasury v. City of Linton* (1945), 223 Ind. 363, 60 N.E.2d 948. Moreover, when a statute contains language similar to that in a statute from another jurisdiction, federal court decisions construing the other statute are persuasive. *See, e.g., Indiana Civil Rights Comm'n v. Sutherland Lumber* (1979), 182 Ind. App. 133, 394 N.E.2d 949.

These rules have special bearing in the present case because the covenant statute's critical language is virtually identical to the New Jersey statute's and, more importantly, because the covenant statute has constitutional Contract Clause ramifications. The United States Supreme Court decided a federal constitutional question, of which it alone is the final arbiter, and the general assembly enacted the covenant statute in the wake of that decision. In this situation, the court is fully prepared to state that the previously existing GES does not constitute a contract within the meaning of the Contract Clause.[6] Fort Wayne National has no § 1983 claim.

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[6] Even if, however, the GES creates a contract, Fort Wayne National would nonetheless have no claim. First, the legislature

CONCLUSION

The GES amendments are not retroactive, and the Department therefore improperly included the income from

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did not violate the GES by amending it because the amendment has only prospective effect; that is, it does not apply to previously issued bonds.

Second, even though the Department erroneously tried to give the amendment retroactive effect, it did not thereby work a violation of the Contract Clause. The Contract Clause forbids the states to pass any "*law* impairing the obligation of contracts." U.S. CONST., art. I, § 10 (emphasis added). Although an administrative agency may perform acts that fall within the meaning of "law" as the word is used in the Contract Clause, only those acts which are legislative in nature will qualify. *See Louisville & Nashville R. Co. v. Garrett* (1913), 231 U.S. 298, 318, 34 S.Ct. 48, 56, 58 L.Ed. 229, 244-45. The Department's action in this case, however, was an adjudicative one, *see Indiana Dep't of Environmental Mgt. v. AMAX, Inc.* (1988), Ind. App., 529 N.E.2d 1209, and therefore not subject to the Contract Clause.

Assuming *arguendo* the Department's action did run afoul of the Contract Clause, Fort Wayne National would still face the impossible burden of showing a Contract Clause violation will support a § 1983 action. The only United States Supreme Court decision on the question is *Carter v. Greenhow* (1885), 114 U.S. 317, 5 S.Ct. 928, 29 L.Ed. 202, in which the Court unequivocally held a Contract Clause violation will not support a § 1983 action. In *Dennis v. Higgins* (1991), 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969, the Court held violations of the Commerce Clause, U.S. CONST., art. I, § 8, were violations of a constitutional "right" within the meaning of § 1983. But while there is some similarity in the construction of the two clauses because they both lie within Article I, *Dennis*, contrary to Fort Wayne National's contentions, is wholly insufficient authority to overrule *Carter*. Our supreme court's recent decision in *Indiana Dep't of State Revenue v. Felix* (1991), Ind., 571 N.E.2d 287, *cert. dismissed* (1992), —— U.S. ——, 112 S.Ct. 1073, 117 L.Ed.2d 278, makes clear that lower courts should exercise a great deal of restraint before declining to follow the precedential effect of old United States Supreme Court decisions, and until higher authority clearly runs to the contrary, this court will accordingly follow *Carter*.

Even if *Dennis* had overruled *Carter*, however, Fort Wayne National would still not prevail because the company has brought

Fort Wayne National's outstanding municipal bonds in its calculation of Fort Wayne National's FIT liability. Because the municipal bond income cannot be included, 31 U.S.C. § 3124 precludes the inclusion of federal bond income. Fort Wayne National, however, has failed to show it has a valid cause of action under 42 U.S.C. § 1983.

Because there is no genuine issue of material fact and the parties have shown their entitlement to judgment as a matter of law, the court GRANTS Fort Wayne National's motion for summary judgment on the questions of the inclusion of the municipal and federal bond income within the calculation of the FIT. The court also GRANTS summary judgment to the Department on Fort Wayne National's § 1983 claim.

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this action against the Department and its Commissioner Acting in his official capacity. "When sued for damages, states and state officials acting in their official capacities are not persons under . . . § 1983." *Felix*, 571 N.E.2d at 295 (citing *Will v. Michigan Dep't of State Police* (1989), 491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45). As for the injunctive relief Fort Wayne National seeks, the court's decision that the GES amendment has only prospective effect renders the need for extraordinary equitable relief moot, and Fort Wayne National therefore has no cognizable claim under § 1983. *See id.* at 295.

Finally, to the extent Fort Wayne National's argument can be liberally construed to include a claim that the covenant statute has been violated, the preceding discussion applies with equal force to that statute.

APPENDIX C

I.C. 6-8-5-1(a) (1989)

(a) All bonds issued after March 11, 1959, or notes, warrants, or other evidences of indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.

I.C. 6-8-5-1(a) (1990)

SECTION 37. IC 6-8-5-1 IS AMENDED TO READ AS FOLLOWS: Sec. 1. (a) All bonds issued after March 11, 1959, or notes, warrants, or other evidences of indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the hold-

er's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the financial institutions tax and the state inheritance tax.

I.C. 6-8-5-1(a), (c), (d) (1991)

SECTION 17. IC-6-8-5-1, AS AMENDED BY P.L. 21-1990, SECTION 37, IS AMENDED TO READ AS FOLLOWS: Sec. 1. (a) All bonds issued after March 11, 1959, or notes, warrants, or other evidences of indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except [the financial institutions tax and] the state inheritance tax.*

(c) This section does not apply to measuring the franchise tax imposed on the privilege of transacting the business of a financial institution in Indiana under IC 6-5.5.

(d) No other statute exempting interest paid on debt obligations of:

(1) a state or local public entity, including an agency, a government corporation, or an authority; or

---

* Bracketed material was struck through on original.

(2) a corporation or other entity leasing real or personal property to an entity described in subdivision (1);

applies to measuring of the franchise tax imposed on financial institutions under IC 6-5.5.

APPENDIX D

IN THE
SUPREME COURT OF INDIANA

No. 49S10-9406-TA-521

INDIANA DEPARTMENT OF STATE REVENUE, and KENNETH L. MILLER, in his Capacity as Commissioner of THE INDIANA DEPARTMENT OF STATE REVENUE,
Appellants
(Respondents Below),

v.

FORT WAYNE NATIONAL CORPORATION,
Appellee
(Petitioner Below).

Appeal from the Indiana Tax Court
Cause No. 49T10-9204-TA-17
The Honorable Thomas G. Fisher, Judge

ANSWER BRIEF ON REVIEW OF FORT WAYNE NATIONAL CORPORATION AS APPELLEE AND BRIEF ON REVIEW OF FORT WAYNE NATIONAL CORPORATION AS CROSS-APPELLANT

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ARGUMENT—CROSS-APPEAL

A. TO GIVE THE FIT RETROACTIVE APPLICATION TO OUTSTANDING BONDS WOULD IMPAIR THE CONTRACT WITH THE HOLDER OF THOSE BONDS

a. *Incorporation is Implied as a Matter of Law*

It is hornbook law that public bonds incorporate the provisions of the bond authority statutes which in many instances include tax exemption clauses. McQuillin, the leading commentator states the rule:

> Laws governing the issuance of municipal bonds constitute a part of the obligation of a bond, as if written therein. Thus, the laws in effect at the time of the issuance of bonds, as well as the judicial construction placed thereon, enter into and become an essential part of the contract, and the obligation of the contract cannot be impaired or its fulfillment hampered or obstructed by subsequent change . . ." See McQuillin, MUNICIPAL CORPORATIONS § 43.16, 3rd Ed.

This is the rule in Indiana in regard to statutes governing municipal bonds. *See Read v. Beczkiewicz* (1939), 215 Ind. 389, 18 N.E.2d 789 (1939), *modified*, 215 Ind. 365, 19 N.E.2d 465 (1939). In the *Read* case, after Barrett law bonds were issued, a change in the statute was enacted which was sought to be applied to a subsequent transaction involving the bonds. In holding that it would be unconstitutional to do so this Court held:

> In issuing the bonds it binds itself by contract, and the statute becomes part of the contract . . . .
>
> The holders of this class of bonds are entitled to be dealt with according to the terms of the bonds

> and the statute in force at the time of the resolution under which they were issued . . . .
>
> The provision of that statute that . . . shall be used for the payment of the bonds must be treated as written into and a part of the bonds issued when the statute was in force. Any subsequent legislation which diverts part of the funds to another purpose impairs the obligation of the contract. *Read v. Beczkiewicz* at 794 and 796.

Its statements reflect principles recognized in Indiana law and utilized in the context of public employment in more recent cases. *Wencke v. Indianapolis* (1981), Ind. App., 429 N.E.2d 295 (no retroactive application of earlier retirement age), *Board of Trustees v. Hill* (1985), Ind., 472 N.E.2d 204 (no retroactive change in pension vesting rules).

Cases from other jurisdictions make it clear that statutory incorporation into bond contracts is the norm. *See e.g. Continental Ill. Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 6924 (9th Cir. 1983), *appeal dismissed, The Don't Bankrupt Washington Cmte. v. Continental Ill. Nat'l Bank & Trust Co.*, 460 U.S. 1077 (1983) (applying rule but refusing to read incorporation to include a subsequent statute which would destroy bonds' value).

Based upon the foregoing, unless this Court is prepared to adopt a different standard for Indiana bondholders than for Indiana public office holders, if this Court first concludes that the FIT must be construed as applicable to Public Bonds issued prior to its effective date, then Fort Wayne would be entitled to judgment on its Contract Clause claim.

The Tax Court reasoned that the passage in 1989 of a Bond Covenant Statute, I.C. § 5-1-14-9, was evidence of the absence of the prior incorporation of any legislation. *Fort Wayne* at 675. We know from *Read v.*

Beczkiewicz that the Tax Court's conclusion overstates the point and that there previously had been incorporation in Fort Wayne's bond contracts at least of important matters contained in the bond statutes, a test which would include the tax exemption. The Bond Covenant Statute simply went beyond existing incorporation of important matters to include *all* rights and *all* regulations. Thus, it is logically consistent with prior incorporation of the Exemption Statutes.

b. *If Not Implied By Law There Was Here Express Incorporation*

Both our Appellate Court and Professor Williston in his *Treatise On Contracts* recognize that in addition to implied incorporation of existing law, there can be express incorporation of existing law through the parties writings. Professor Williston says:

> Doubtless, law frequently is adopted by the parties as a portion of their agreement. Whether it is or not in any particular case should be determined by the same standard of interpretation as is applied to their expressions in other respects. A contract providing for a forfeiture for failing to pay taxes for three months after the taxes "become due and payable" incorporates a statute stating when they are due and payable. So, too, where by the terms of a contract, money is payable to a state, a statute prescribing to whom and in what place the money shall be due and payable will be considered with reference to the performance of the obligation to pay. Vol. 4, WILLISTON ON CONTRACTS § 614 (3rd ed. 1961).

Further, our Appellate Court recognized the duality of modes of incorporation in *Ethyl Corp. v. Forcum-Lannom Associates, Inc.* (1982), Ind. App. 433 N.E.2d 1214 holding

> Based upon the foregoing reasoning and authorities this Court could readily hold, in the absence of contractual language to the contrary and in a proper case, a builder to have impliedly agreed to comply with all applicable building codes and regulations when he agrees to "design and construct" a building or an addition. However, the instant case is an even more compelling one in which to hold, as we do, a designer-builder to be responsible for compliance with all applicable building regulations, where the express language of the agreement reveals the parties affirmatively made such an agreement. *Ethyl Corp.* at 1221.

Fort Wayne took pains to plead that the Exemption Statutes were was expressly incorporated by the various bond issuers, attaching in support of such allegation representative sales materials, sample attorney's opinions, and sample bonds as described above. These materials, the existence of which the Department does not question, amount either to an express incorporation or, at a minimum, a form of promissory reliance which is entitled to constitutional protection. *See, e.g. S.S. Co. v. Joliffe,* 69 U.S. 450, 2 Wall 450 (1865).

B. TO GIVE THE FIT RETROACTIVE APPLICATION TO OUTSTANDING BONDS WOULD VIOLATE DUE PROCESS

For a variety of reasons, our courts in Indiana have not been forced to explore the questions concerning the "due process" issue inherent in retroactive legislation. However, the U.S. Supreme Court has done so periodically over the years. When the degree of retroactivity exceeded the need for the measure, that Court has found both federal tax, state tax and other statutes with significantly retroactive effect to violate the due process clause of the United States Constitution. * * *

* * * *

C. MOST OF THE TAX COURT'S GROUNDS FOR AVOIDING 42 U.S.C. § 1983 ARE IN ERROR

The early case of *Carter v. Greenhow,* 114 U.S. 317, 29 L.Ed. 202, 5 S.Ct. 928 (1885) did not exclude contract impairment lawsuits under the Civil Rights Act. Any question regarding this point is clarified by the decision of *Dennis v. Higgins,* 498 U.S. 439, 111 S. Ct. 865 (1991).

The action taken by the Department in seeking to collect taxes from all FIT taxpayers premised on Public Bond income and in issuing regulations to that effect did not become "adjudicative" simply because that basic "legislative" action was applied to a single taxpayer by denial of its claim for refund. The Department would have ruled similarly no matter which FIT taxpayer had applied. It is the retroactive application of the statute complained of here and that, if it applies, applies to all FIT taxpayers and its legislative action.

Finally, the plaintiff has prayed for and is entitled to injunctive relief. The decision in *Indiana Dep't of State Revenue v. Felix* (1991), Ind., 571 N.E.2d 287, *cert. dismissed,* 117 L.ed.2d 278, 112 S.Ct. 1073 (U.S. 1992) depended on a legislative mooting of the issue and would be expanded improperly if construed to encompass the idea that a favorable court decision granting relief can be used to defeat rights accruing under 42 U.S.C. § 1983.

However, Fort Wayne does agree that, if the Tax Court's decision that the FIT does not apply to previously issued bonds is affirmed, then there has been no impairment, hence no 42 U.S.C. § 1983 right.

* * * *

STATE OF INDIANA
IN THE INDIANA TAX COURT

Cause No. ————

FORT WAYNE NATIONAL CORPORATION,
Petitioner,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, and KENNETH L. MILLER in his capacity as Commissioner of THE INDIANA DEPARTMENT OF REVENUE,
Respondents.

ORIGINAL TAX APPEAL PETITION TO OBTAIN A REFUND OF INDIANA FINANCIAL INSTITUTIONS TAX AND FOR INJUNCTIVE RELIEF

Comes now the petitioner, Fort Wayne National Corporation ("FWNC"), and for its Petition For Refund and Claim pursuant to 42 USCA § 1983 against the respondents Indiana Department of State Revenue and Kenneth L. Miller in his capacity as Commissioner of the Indiana Department of State Revenue alleges and states:

Count I

Claim For Refund

1. FWNC is a national bank holding company as defined in IC 6-5.5-1-17 and has its principal offices located in Fort Wayne, Indiana.

2. The respondent, Indiana Department of State Revenue ("Department") is an agency of the State of Indiana

and administers the Indiana Financial Institutions Tax Act imposed by I.C. 6-5.5-1-1 *et seq.* (the "Act").

3. FWNC is accordingly a "taxpayer" for purposes of the Act and filed its first return October 15, 1991, or the period January 1, 1990, to December 31, 1990 ("Return Period").

4. During the Return Period, FWNC's municipal bond income came from various sources, including income on various bonds issued prior to May 1, 1989 in a gross amount of $6,905,994. Applying the allocation principles of IRC § 265 embodied in IC 6-5.5-1-2, FWNC incurred $5,492,427 in expense in generating such income, which expense is not a proper deduction if the associated income is excluded. Accordingly, FWNC's net municipal bond income was $1,414,567 which produced ("Municipal Bond Income Tax") in amount of $120,238. The bulk of the Municipal Bond Income was received from bonds issued pursuant to IC 6-8-5-1, although certain of the Municipal Bond Income came from tax-free bonds issued pursuant to Indiana exemption statutes other than IC 6-8-5-1 for specific types of investments. Because of the substantial similarity of language between IC 6-8-5-1 and the other exemption statutes for other specific types of Indiana governmental obligations, if Petitioner is successful in regard to bonds issued under IC 6-8-5-1, it should also be successful with municipal and other bonds issued under other similar statutes.

5. Attached hereto as Exhibit A, parts 1 to 12 are copies of various materials relating to several of the municipal bonds FWNC now holds, the income from which was subjected to FIT Tax as described herein. The materials include attorneys' opinions printed on the backs of the bonds and copies of various Official Statements and offering circulars pursuant to which such bonds were sold. The pertinent portions thereof relating to taxability have been extracted and cumulated in Exhibit B.

6. During the Return Period, FWNC's federal source income came from various sources, including ownership of many U.S. Government bonds issued prior to May 1, 1989 in a gross amount of $21,947,949 out of a total of more than $38,000,000 of gross income on all federal source securities. Applying the allocation principles of IRC § 265 embodied in IC 6-5.5-1-2, FWNC incurred $15,297,418 in expenses in generating income from pre-May 1989 federal securities, which expense is not a proper deduction if the associated income is required to be excluded. Accordingly, FWNC's net federal source income on federal source income from bonds issued prior to May 1, 1991 was $6,650,531 and FIT tax on federal source income limited to bonds issued prior to May 1, 1989 produced $565,295 ("Discriminatory Federal Source Income Tax").

7. The return filed by FWNC with the Department under the Act for the Return Period was transmitted showing estimated payments previously made in excess of the amount of the financial institutions tax ("FIT") shown due for such Return Period. The amount of annual FIT shown due in such return was $1,841,671, and there was included in such total amount both its Municipal Bond Income Tax and its Discriminatory Federal Source Income Tax.

8. On or about October 16, 1991, FWNC filed its claim for refund seeking repayment to it of Municipal Bond Income Tax and Discriminatory Federal Source Income Tax in the total amount of $685,633.

9. Prior to the enactment of the FIT petitioner paid Indiana Bank Tax (which did not apply to Municipal Bond income) but such tax was repealed by the Act which created the FIT. Prior to the enactment of the FIT, other taxpayers now subject to the FIT who were not paying Indiana Bank Tax were subject to Indiana Adjusted Gross Income Tax and to Indiana Supplemental Income Tax. By its terms the FIT made such taxes

inapplicable to any FIT taxpayer. Thus, the FIT replaced previously existing Bank Tax for many taxpayers and previously existing Adjusted Gross Income Tax for all others. The impact of such "replacement" was to destroy for many taxpayers formerly existing parity in after-tax yield between taxable and tax-free investments. Exhibit C attached hereto contains examples illustrating the difference in impact on yields between a truly "new" tax and a "replacement" tax.

10. The first ground of such claim for refund as related to the Municipal Bond Income Tax was the unconstitutionality of the Act in taxing Municipal Bond Income on bonds issued prior to May 9, 1989, and doing so only for a small and discriminated-against portion of the holders of such bonds with the result that such taxation constitutes both (i) an impairment of the bond contract in violation of Article I, Section 24 of the Indiana Constitution and Article I, Section 10(1) of the U.S. Constitution, and (ii) an arbitrary and capricious classification of the persons subject to paying tax on municipal bond income in violation of Article 1, Section 23, of the Indiana Constitution and the Fourteenth Amendment, Section 1, to the United States Constitution. The classification is arbitrary in that there is no rational basis for distinguishing between banks and others subject to the tax on the one hand and other corporations on the other, including insurance companies which remain untaxed although holding at the time of the passage of the Act substantially as large a percentage of municipal debt as is held by banks, i.e., 20.5% banks v. 17.2% insurance companies (Source Municipal Bond Buyer 1989, p. 42, copy attached as Exhibit D).

The second ground of such claim for refund as related to Municipal Bond Income Tax was the violation of I.C. 5-1-14-9(a) by virtue of the adoption of the Act in a way to impair the pre-existing right of holders of state and municipal obligations to freedom from taxation of such

issues. The provisions of IC 6-5.5-1-2(a)(1) of the Act require deduction of Municipal Bond Income Tax otherwise payable by FWNC on the amount of the Indiana municipal bonds held by it which were issued prior to May 1, 1989 from FWNC's FIT tax.

11. The ground of such claim for refund as it relates to the Discriminatory Federal Source Income Tax was that the Act violated 31 U.S.C. § 3124(a) in that, by reason of the aforesaid unconstitutionality of treatment of Municipal Bond Income, Indiana's FIT discriminated against federal obligations in taxing all federal obligations without extending the same exemption to previously outstanding federal securities as must either constitutionally be accorded Municipal Bond Issues or as is required to be accorded them by IC 5-1-14-9(a). Under this ground and by application of IC 6-5.5-1-2(a)(1), FWNC would be entitled to a refund of Discriminatory Federal Source Income Tax paid on the federal securities held by it issued prior to May 1, 1989.

12. More than 181 days have expired since the filing of Petitioner's claim for refund without action on same by the Department of Revenue. This Court has jurisdiction over this appeal because the Department has failed to grant FWNC's claim for refund for that period of time. FWNC has filed this claim for refund pursuant to IC 6-8.1-9-1, which is incorporated by reference by IC 6-5.5-9-2.

WHEREFORE, FWNC demands judgment against the Department for $685,533 in Municipal Bond Income Tax and Discriminatory Federal Source Income Tax paid under the Act, plus interest as provided by law, and for all further just relief.

Count II

Claim Under 42 USCA § 1983

13. Petitioner incorporates the provisions of rhetorical paragraphs 1-12 of Count I above.

14. Kenneth L. Miller is the duly appointed and qualified Commissioner of the Department and in such position is charged with overseeing the administration of Indiana's FIT and is being sued in his official capacity.

15. The foundation of Petitioner's claim for refund is a breach of its constitutional right to be free from State impairment of its contracts with the State and to have federal obligations taken in compliance with 31 USC § 3124(a). Respondents have in fact impaired FWNC's constitutional rights by taxing its Municipal Bond Income in violation of the promise contained in such securities of freedom from taxation.

16. FWNC is entitled to recover its attorney fees pursuant to 42 USC § 1988 should it prevail in this action.

17. The continued imposition of Indiana FIT on FWNC's municipal bond income and federal source from securities issued proir to May 1, 1989 represents an unconstitutional and therefore illegal action which should be enjoined as respects future collection.

WHEREFORE, FWNC demands judgment against the Department for $685,633, for its reasonable attorneys fees and other costs of this action, and for an injunction against the Respondents from collecting further FIT from Petitioner from the identified sources of income *i.e.* from federal and Indiana securities issued prior to May 1, 1989.

Respectfully submitted,

BAKER & DANIELS

By: /s/ William F. Landers

By: /s/ Thomas M. Shoaff
Attorney Nos. 8668-49, 0302-02
Attorneys for Fort Wayne
National Corporation

APPENDIX E

51. MUNICIPAL BONDS. Income from municipal bonds issued on or after March 11, 1959, is subject to the statute quoted below:

Chapter 154—Acts of 1959

SECTION 1. That all bonds hereafter issued in the State of Indiana or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by the holder from the sale of such bonds to the extent of the holder's cost of acquisition or proceeds received upon redemption prior to maturity, or proceeds received upon maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the State of Indiana for all purposes except the State Inheritance Tax.